No.01-377

Supreme Court, U.S.
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In The

Supreme Court of the United States

David Knox Wilson,
Petitioner,

v.

Atlas Wireline Service/
C N A Insurance Companies, and
Director, Office Of Workers'
Compensation Programs,
United States Department of Labor
Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeal
For the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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Question Presented

Does the "worsening" of a documented Permanent Total condition render the condition to be classified as Temporary and nullify the original onset of Permanency status.

When is an injury considered Permanent under the Longshore and Harbor Workers Act?

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Reply

In their opposition the employer/carrier have asked this Court to deny Wilson's Petition for Certiorari because the Administrative Law Judge should be the finder of fact and this Court has no authority. However, the facts of this case are already clear. It is the contradicting rulings by the Benefits Review Board and Courts with their conflicting interpretation of the Longshore Act that is at question. This certainly warrants the granting of certiorari under Supreme Court Rule Part III Rule 10(a), 10(b) and 10(c).

When is an injury considered Permanent under the Longshore Act and the claimant is therefore entitled to cost of living increases in his compensation?

Courts have ruled, *"at the earliest date a doctor rates a condition will determine the onset of permanency."* *Smith v. Non Appropriated Fund & Commercial Union Insurance Co., BRB No. 98-0917 (03/10/1999);Korenschild v. WH Streit, Inc., BRB97-0888; Jones v. Geneco Inc., 21 BRBS 12 (1988);McKnight v. Carolina Shipping Co. 32 BRBS 165 (1998); Divita v. Valley Steel, BRB 96-0810; Wainwright v. Jacksonville Shipyards Inc.,BRB 91-1625, 92-1625A and Sketo v. Dolphine Titan Int'l.,28 BRBS 212 (1994).*

Some Courts have ruled permanency begins at MMI (maximum medical improvement). But which MMI? The first MMI, the second MMI or third MMI that was placed on a claimant eight years later after a new medical procedure was developed and claimant then underwent. And what does Maximum Medical Improvement have to do with permanency? As in this case, did the newly discovered medical procedure in 1996 that Wilson undergo void the

previously established date of Permanency that was documented eight years before?

Some Courts have ruled that regardless of MMI a condition is permanent if it has continued for a lengthy period and is indefinite. *Watson v. Gulf Stevedore 400 F. 2d 749(5th Cir. 1968)and SGS Control Service and C N A Insurance v. Director OWCP, 86 F.3d 438,444 30 BRBS 57, 62 (CRT)(5th Cir. 1996)* While the very same Court failed, as in Wilson's case, to uphold their own previous rulings.

Congress had the wisdom and foresight to know that the American Medical Association and it's trained physicians had a better understanding of when a medical condition was permanent than did the ALJ and a bunch of lawyers. Congress clearly deferred establishment of permanency to the AMA. Therefore, the definition of permanency was written at the first section of the Longshore Act in the definitions section. A disability will be determined permanent under the guides promulgated and modified from time to time by the AMA. (USC 33 Ch 18 Sec. 902(10))

Congress did not state that a condition must be at MMI before permanency was established. That is an opinion of some Administrative Law Judges who really do not have the authority to change Congressional intent and the definition of permanency under the Act. The ALJs and Courts are confused on differentiating between MMI and Permanency.

When Wilson was given an anatomical Permanent Physical disability rating pursuant AMA guidelines on 12/19/1989 he heard the doctor. But when he was denied his former employment on 12/20/1989, where he had worked for almost ten years, because of the permanent physical limitations that resulted from his accident....that hit him like a ton of lead. He then not

only heard it, he knew his condition was permanent. And yes, Wilson developed problems with alcohol and pain medications because Wilson, the Dept. of Labor OWCP nor employer/carrier could find any suitable alternative employment from 1989 until within his physical limitations and being in pain 24 hours a day seems to change a person. And now, thirteen years later, it is ridiculous for anyone to put forth the idea that Wilson's condition is still temporary. The employer/carrier state in their opposition that Wilson is employable if not for his psychological condition. The fact is, the record shows employer/carrier were unable to show any suitable alternative employment for years 1988 through 1997 before the psychological issue even surfaced. It is documented on record. The employer/carrier stated in their opposition that Wilson only had psychological problems after the investigator filmed Wilson. However, the record shows that employer/carrier had denied Wilson's treating neurosurgeon's request for psychological treatment two years before in 1995. Dr. Lowry was also asked on record, "have you ever given Mr. Wilson an anatomical permanent disability rating?" and Dr. Lowry responded, "I did way back in 1989 but his permanent rating is higher now."

The employer/carrier misguided this Court when they stated that Wilson's condition improved after the implantation of the Spinal Infusion Morphine Pump. The record shows Wilson's AMA anatomical permanent rating increased. How can an increase in anatomical permanent disability rating with more physical limitations be considered an improvement in a condition?

And the employer/carrier have even withheld the truth of record concerning Wilson's employability

and his physical restrictions. Employer/carrier omitted that the record clearly shows that Wilson's own treating neurosurgeon stated Wilson should lay down several times a day, sometimes up to an hour at a time, to relieve the weight on his lumbar section. And it is fact that all vocational experts, even employer's expert, stated this would certainly prevent Wilson from gainful employment.

Another fact of record employer/carrier omitted is that a few days before Wilson was filmed holding a saw he had just had a 30% increase in his Morphine dosage but still (as the investigator testified) Wilson returned inside after two hours and remained inside laying down for the rest of the day.

One other misguided information the employer/carrier presented to this Court was that Wilson's benefits were completely terminated (including previously approved required important medical treatment to his Spinal Morphine Pump) because they thought he was able to work. What does terminating medical benefits have to do with their position that they thought he could work? Terminate his medical!!! We think he can work! The record clearly shows Wilson was told to take $50,000 to settle his entire claim or C N A Insurance would terminate all benefits. And when Wilson refused, they terminated benefits for almost a year and a half. The attorney for employer/carrier acknowledged this threat on record before the ALJ.

Wilson does not ask this court to be a finder of fact. The facts are established. Wilson is asking this Court to uphold the Longshore Act as written and Congressional Intent.

"We will not defer to an agency position which is contrary to an intent of Congress expressed in

unambiguous terms." *Estate of Cowart v. Nichols Drilling Co.*, 505 U.S. 469 476 (1992)

CONCLUSION

Wilson was given an anatomical permanent disability rating on 12/19/1989, the record shows the next day, his employer refused to allow him to return to work due to the permanent physical restrictions. Thus, his prima facia case of Permanent Total disability was met. The fact that the Dept. of Labor and employer documented, on record, that they were unable to find any employment within Wilson's physical limitations for years and then afterwards Wilson's condition worsened, causing other medical complications years later, has nothing to do with the onset of permanency or Wilson's entitlement to the annual cost of living increase in his compensation.

Respectfully submitted

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